92-1455

No. ——

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fair Housing Act prohibit racial discrimination in the sale of homeowners' insurance?

2. Does the McCarran-Ferguson Act preclude the administrative or judicial application of the Fair Housing Act to state-regulated insurance sales?

PARTIES

The names of all of the parties appear in the caption. Petitioner American Family Mutual Insurance Company is a mutual insurance corporation established and regulated under the Wisconsin Insurance Code. It has no parent company, and all of its subsidiaries are wholly owned, either directly or through other wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL STATUTES AND REGULATIONS INVOLVED	1
STATE STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	5
Nature of the case	5
Procedural history	6
REASONS FOR GRANTING THE WRIT	12
I. THE SEVENTH CIRCUIT'S DECISION TO APPLY THE FAIR HOUSING ACT TO HOMEOWNERS' INSURANCE CONFLICTS WITH THE FOURTH CIRCUIT, AND ITS DEFERENCE TO ADMINISTRATIVE RULES IGNORES THIS COURT'S DECISIONS	12
A. The Fair Housing Act, As The Fourth Circuit Has Held, Does Not Apply To Insurance Sales	12
B. The Court Of Appeals' Deference To HUD's Regulations Disregards This Court's Unanimous Decision In *Adams Fruit*	14

TABLE OF CONTENTS—Continued

Page

II. THE McCARRAN-FERGUSON ACT PREVENTS THE FAIR HOUSING ACT'S APPLICATION TO INSURERS WHETHER OR NOT THE FAIR HOUSING ACT ACTUALLY CONFLICTS WITH ANY STATE LAW 18

A. The Seventh Circuit's Application Of McCarran-Ferguson To Subsequently Enacted Civil Rights Laws Conflicts With The Second Circuit 19

B. McCarran-Ferguson, This Court Has Held, Does Not Permit Simultaneous Federal And State Insurance Regulation, Whether Or Not There Is An Actual Conflict Between The Regulations 21

C. The Seventh Circuit's Decision Will Lead Inevitably To Jurisdictional Confusion And Inconsistent Regulation 27

CONCLUSION 30

APPENDIX

Decision, U.S. Court of Appeals for the Seventh Circuit 1a

Transcript of oral decision, U.S. District Court for the Eastern District of Wisconsin 28a

Order granting motion to dismiss, U.S. District Court for the Eastern District of Wisconsin 32a

Order denying petition for rehearing, U.S. Court of Appeals for the Seventh Circuit 34a

TABLE OF AUTHORITIES

Cases Page

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) .. 15, 16, 17
Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) 19
Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199 (D. Colo. 1974) 9
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15, 16
English v. General Electric Co., 496 U.S. 72 (1990) 25
EEOC v. Wooster Brush Co., 523 F. Supp. 1256 (N.D. Ohio 1981), *aff'd in part and rev'd in part*, 727 F.2d 566 (6th Cir. 1984) 8
Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973) 15
FMC Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403 (1990) 22
FTC v. National Casualty Co., 357 U.S. 560 (1957) 22
Gade v. National Solid Wastes Management Ass'n, —— U.S. ——, 112 S.Ct. 2374 (1992) 26, 27
Garner v. Teamsters Union, 346 U.S. 485 (1953) .. 26
Lowe v. AARCO-American, Inc., 536 F.2d 1160 (7th Cir. 1976) 9, 21, 23, 24
Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984) ..... 7, *passim*
NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992) 8
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 24
SEC v. National Securities, Inc., 393 U.S. 453 (1969) 19, 22
Spirt v. Teachers Ins. and Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983) 8, 20
Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) 12
United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 22
Women in City Government United v. New York, 515 F. Supp. 295 (S.D.N.Y. 1981) 8

TABLE OF AUTHORITIES—Continued

Federal Statutes, Regulations and Rules	Page
Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*	1, *passim*
McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*	8, *passim*
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.*	15
12 U.S.C. § 2801(a)	14
15 U.S.C. § 1012(a)	18
15 U.S.C. § 1012(b)	18, 21
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	11
28 U.S.C. § 1331	11
28 U.S.C. § 1343(a)	11
29 U.S.C. § 1853	17
42 U.S.C. § 1981	7, 20
42 U.S.C. § 1982	7, 20
42 U.S.C. § 3604	1
42 U.S.C. § 3604(a)	2, *passim*
42 U.S.C. § 3604(b)	2, *passim*
42 U.S.C. § 3605	2, *passim*
42 U.S.C. § 3614(a)	29
59 Stat. 34 (1945)	22
24 CFR § 100.70(d)(4)	7, 10, 15
Supreme Court Rule 13.1	1
Supreme Court Rule 13.4	1
Fed. R. Civ. P. 54(b)	8
Wisconsin Statutes and Regulations	
Wis. Stats. § 101.22(2)(e)	7, 8, 25
Wis. Stats. § 101.22(6m)(a)	8, 25
Wis. Stats. § 601.41	25
Wis. Stats. § 625.11(1)	7, 25
Wis. Stats. § 628.34(3)	7, 25
Wis. Admin. Code § Ins 6.68	7, 25
Other Authorities	
A.M. Best Data Base Services, *Property Casualty Experience By State By Line* (1991)	28
Insurance Information Institute, *The Fact Book* (1993)	28
Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 Utah L. Rev. 1..	22

PETITION FOR A WRIT OF CERTIORARI

American Family Mutual Insurance Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 20, 1992, and the order denying the company's petition for rehearing and suggestion for rehearing *en banc* entered on December 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 978 F.2d 287 and is reprinted in the appendix ("App.") to this petition. App., pp. 1a-27a. The subsequent order denying the petition for rehearing and suggestion for rehearing *en banc* is not reported. It is reprinted in the appendix at p. 34a.

The decision of the United States District Court for the Eastern District of Wisconsin (Stadtmueller, J.), which the Court of Appeals reversed in part and affirmed in part, was rendered from the bench. It has not been reported. The transcript of the relevant portion of that oral decision is reprinted in the appendix at pp. 28a-31a.

JURISDICTION

The Court of Appeals entered its judgment on October 20, 1992. In an order entered on December 7, 1992, the court denied a timely petition for rehearing and suggestion for rehearing *en banc*. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1) and Supreme Court Rules 13.1 and 13.4.

FEDERAL STATUTES AND REGULATIONS INVOLVED

Fair Housing Act (Title VIII, Civil Rights Act of 1968, as amended)

42 U.S.C. § 3604 provides in part:

Discrimination in the sale or rental of housing and other prohibited practices.

As made applicable by section 803 [42 U.S.C. § 3603] and except as exempted by sections 803(b) and 807 [42 U.S.C. §§ 3603(b), 3607], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race. . . .

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race. . . .

42 U.S.C. § 3605 provides in part:

Discrimination in residential real estate-related transactions.

(a) In general. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race. . . .

(b) As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

* * * *

42 U.S.C. § 3614a. **Rules to implement title.**

The Secretary [of Housing and Urban Development] may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. . . .

24 CFR § 100.70 provides in part:

> (b) It shall be unlawful, because of race . . ., to engage in any conduct relating to the provision of housing or of services therewith that otherwise makes unavailable or denies dwellings to persons.
>
> * * * *
>
> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:
>
> * * * *
>
> (4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race. . . .

McCarran-Ferguson Act

> 15 U.S.C. § 1012(a) **State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) **Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and the . . . Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

STATE STATUTES AND REGULATIONS INVOLVED

Wis. Stats. § 101.22 provides in part:

> (1m) DEFINITIONS. In this section:
>
> * * * *
>
> (h) "Discriminate" means to . . . treat a person or class of persons unequally in a manner described in sub. (2) . . . because of . . . race. . . .
>
> * * * *

(2) DISCRIMINATION PROHIBITED. It is unlawful for any person to discriminate:

* * * *

(e) For a person in the business of insuring against hazards, by refusing to enter into, or by exacting different terms, conditions or privileges with respect to, a contract of insurance against hazards to a dwelling.

Wis. Stats. § 625.11(1) provides in part:

Rate standards. (1) General. Rates shall not be excessive, inadequate or unfairly discriminatory. . . .

Wis. Stats. § 628.34(3) provides in part:

(3) UNFAIR DISCRIMINATION. (a) No insurer may unfairly discriminate among policyholders by charging different premiums or by offering different terms of coverage except on the basis of classifications related to the nature and the degree of the risk covered or the expenses involved. . . .

Wis. Admin. Code § Ins 6.68 provides in part:

Ins 6.68 Unfair discrimination based on geographic location or age of risk. (s. 628.34, Stats.). . . .

(3) SPECIFIC EXAMPLES OF UNFAIR TRADE PRACTICES UNDER S. 628.34, STATS. The following are hereby identified as specific acts or practices which are unfairly discriminatory.

(a) Making . . . any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, cancelling or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:

1. The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or

2. The refusal, cancellation or limitation is required by law or regulatory mandate.

STATEMENT OF THE CASE

Nature of the case. "Redlining," whether practiced by a financial institution, an insurance company, or a governmental body, is reprehensible. It has come to mean, as a pejorative term, invidious discrimination—by race or by geography—that denies people loans or services solely because of where they live or who they are.

The U.S. Court of Appeals for the Seventh Circuit, construing an admittedly ambiguous statute, now has made redlining in the sale of homeowners' insurance subject to the Fair Housing Act. The issue this case presents to the Supreme Court is not whether redlining is wrong—it is—or whether the practice should be regulated and proscribed—it is already, by the states. The issue is whether a federal appellate court, relying primarily on a federal agency's new regulations, can set aside the command of the McCarran-Ferguson Act that, for almost 50 years, has preserved for the states their traditional responsibility for regulating insurance.

"Is redlining in the insurance business a form of racial discrimination violating the Fair Housing Act?" The first line of Judge Easterbrook's opinion for the Court of Appeals puts the question succinctly. To answer the question affirmatively, however, the court found it necessary to reverse one of its own decisions and to contradict, explicitly, the decisions of the Second and Fourth Circuits. Yet it is not just the conflict among the circuits that commends this case to this Court, for the decision raises fundamental questions about judicial deference to administrative regulations and the allocation by Congress, repeatedly recognized by this Court, of the regulatory authority for the "business of insurance" to the states.

Insurance companies evaluate risk and, to provide risk protection, they apportion its costs among the people and organizations they insure. It is a complex process that involves a broad range of factors—age and driving record for example, in automobile insurance; building condition

and replacement cost, for example, in property insurance. Far from violating any law, an insurance company that charges higher rates for greater risks is engaging in the very "core" of the business of insurance. "Risk discrimination," the Court of Appeals emphasized, "is not race discrimination." App. at 3a.

To ensure that permissible risk discrimination does not disguise impermissible racial discrimination, Wisconsin and the other states have imposed a comprehensive regulatory framework on the insurance industry that reflects the particular needs of each state. Without Congressional authorization, however, the Department of Housing and Urban Development and, now, a federal court based on HUD's regulations, have superimposed a federal statute written in very general terms over that system of specific state regulation.

The decision's significance can be measured by the breadth and immediacy of its impact. With the Seventh Circuit's opinion, more than 1,000 insurance companies that insure millions of family homes across this country become subject, for the first time, to federal regulation as well as to state regulation of their sales practices. That may be warranted, as a matter of public policy, because racial discrimination is intolerable in any form. Yet, if federal regulation is warranted, if the states have failed to regulate the insurance industry sufficiently, then that is a decision for Congress—not for the federal judiciary and certainly not for a federal agency.

Procedural history. The plaintiffs—the NAACP, its Milwaukee branch, and eight African-American homeowners in Milwaukee—filed their class action complaint on July 27, 1990. They alleged that the petitioner, American Family Mutual Insurance Company ("American Family"), discriminated on the basis of race in the sale of homeowners' insurance. The complaint alleged that American Family's insurance sales practices violated the Fair Housing Act (Title VIII of the Civil Rights Act of

1968, 42 U.S.C. §§ 3601 *et seq.*), the Civil Rights Acts of 1870 and 1866 (42 U.S.C. §§ 1981 and 1982), Wisconsin's fair housing law (Wis. Stats. § 101.22(2)(e)), and the Wisconsin Insurance Code (Wis. Stats. §§ 625.11(1) and 628.34(3); Wis. Admin. Code § Ins 6.68).

American Family answered the complaint, denying that it had engaged in any racially discriminatory conduct, and moved to dismiss the federal Fair Housing Act and state insurance law claims under Fed. R. Civ. P. 12(b) for failure to state a claim upon which relief can be granted. On the Fair Housing Act claim, American Family specifically contended that the Act's proscription of discriminatory housing practices does not apply to the sale of homeowners' property and casualty insurance.

The district court agreed, granting the company's motion to dismiss the claims on December 11, 1990. It relied on "the most significant case in this area," App. at 29a, the U.S. Court of Appeals' decision in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), which found the Fair Housing Act inapplicable to insurance sales. Judge Stadtmueller noted in his bench decision that Congress repeatedly had rejected proposals introduced after the *Mackey* decision to amend the Fair Housing Act to prohibit discriminatory insurance practices. App. at 29a.

In dismissing the Fair Housing Act claim, the district court declined to be bound by regulations issued in 1989 by the U.S. Department of Housing and Urban Development (HUD) that define the Fair Housing Act's "prohibited practices" to include "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race. . . ." 24 CFR § 100.70(d)(4). Those regulations, the court said, were promulgated "without any statutory authority. . . ." App. at 29a. The district court also found that the state insurance code provides no private right of action for

racial discrimination in the sale of homeowners' insurance policies.[1]

On December 17, 1990, the district court entered a final judgment under Fed. R. Civ. P. 54(b) that dismissed the Fair Housing Act and state insurance code claims. Judge Stadtmueller directed the entry of a final judgment, making his decision immediately appealable, because the trial court's backlog provided "sufficient time" for the parties to "revisit" those claims if the Court of Appeals reversed the decision. R. 22 at p. 41.

The plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the dismissal of the state law claim but reversed the district court's Fair Housing Act decision. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), App. at 1a-27a. The Court of Appeals recognized at the outset that "[a]ny effort to use federal law to prescribe or penalize the behavior of insurers must reckon with the McCarran-Ferguson Act," 15 U.S.C. §§ 1011 *et seq.* App. at 9a. The statute is a form of "inverse preemption," Judge Easterbrook wrote for the court, that since 1945 has preserved the states' power to regulate the "business of insurance." McCarran-Ferguson could block any application of the Fair Housing Act to insurers.

Contradicting the Second Circuit's decision in *Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), and several district court decisions,[2] the Sev-

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[1] The parties agree that Wisconsin's fair housing law, Wis. Stats. § 101.22(2)(e), creates a private remedy for racial discrimination in insurance sales. A person (or the state) alleging a violation of that statute "may bring a civil action for injunctive relief, for damages, including punitive damages, and, in the case of a prevailing plaintiff, for court costs and reasonable attorneys fees." Wis. Stats. § 101.22(6m)(a).

[2] *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981), *aff'd in part and rev'd in part*, 727 F.2d 566 (6th Cir. 1984); *Women in City Government United v. New York*, 515 F. Supp. 295

enth Circuit rejected the plaintiffs' argument that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights legislation like the Civil Rights Act of 1968. App. at 10a-13a. But that threshold determination did not resolve the case.

The Seventh Circuit next concluded that the McCarran-Ferguson Act, while governing the interpretation of the Fair Housing Act, still does not prevent that statute from reaching property and casualty insurers. Explicitly overruling its own decision in *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976) (per curiam), the court held that a federal statute duplicating a state insurance law does not necessarily "invalidate, impair, or supersede" the state law in violation of McCarran-Ferguson, even though the federal law provides different remedies. App. at 13a-16a. If the Fair Housing Act merely prohibits the same insurance practices the Wisconsin Insurance Code prohibits, the court concluded, the McCarran-Ferguson Act does not insulate insurers from simultaneous federal and state regulation. *Id.* at 16a. "Duplication," the court said, "is not conflict." *Id.* at 13a.

With the McCarran-Ferguson Act issue resolved, the Court of Appeals next asked whether the Fair Housing Act actually covers the sale of homeowners' insurance. It quickly disposed of the plaintiffs' assertion that section 3605 applies to insurers, noting that insurers do not provide "financial assistance" to home buyers. *Id.* at 16a-17a. The court then turned to section 3604, which makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race," 42 U.S.C. § 3604(a), or to "discriminate against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race," 42 U.S.C. § 3604(b).

(S.D.N.Y. 1981); *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974).

Refusing to sell insurance "make[s a dwelling] unavailable" under section 3604(a), the plaintiffs argued, and property insurance is a "service" rendered "in connection" with the sale of a dwelling under section 3604(b). The Court of Appeals found the statute ambiguous. "Nothing in the text of the statute permits us to reject [the plaintiffs'] proposed readings," the court said. App. at 18a. But, it added, "[a]lthough § 3604 could bear the reading plaintiffs propose, it need not." *Id.* The court resolved the ambiguity by rejecting the Fourth Circuit's decision on the identical issue and by deferring to a federal agency's recent interpretation of the statute.

The Fourth Circuit had concluded in *Mackey* that the Fair Housing Act does not apply to insurers. Section 3604 "does not proscribe the alleged hazard insurance redlining practice," the court held, because "there is no mention in the Fair Housing Act of insurance" and because there was no evidence Congress intended to apply the Act to the insurance industry. 724 F.2d at 423. The Seventh Circuit found that reasoning unpersuasive. App. at 19a-23a. Rather than attempting to construe the statute independently, however, the Seventh Circuit simply deferred to the HUD regulations, promulgated 21 years after Congress enacted the Fair Housing Act and five years after the *Mackey* decision, that define racial discrimination in insurance sales as a prohibited practice. 24 CFR § 100.70(d)(4). Section 3604 is "sufficiently pliable that its text can bear the Secretary's construction," the Court of Appeals said, and it accepted that "plausible construction." App. at 23a.

In concluding the opinion, the three-judge panel said that it had been circulated to all of the Seventh Circuit's active judges, acknowledging the impact of the decision: "[T]his opinion overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and . . . it conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*. . . ." *Id.* at

27a. The Court of Appeals remanded the case for trial, which is now scheduled to begin February 6, 1995.

The trial court decided this case on American Family's motion to dismiss. Accordingly, the Court of Appeals "assume[d]" that the plaintiffs could prove "disparate treatment [by race] and not just a disparate impact of decisions made on actuarial grounds." App. at 2a-3a. However, to prevail at trial in this case under the Fair Housing Act, the court said, the plaintiffs need only prove that the insurance practices at issue had a disparate impact and *not* that they were the result of intentional racial discrimination, the heavier burden of proof the plaintiffs must carry on all of their other claims. *Id.* at 7a-8a; *see infra*, n.3.

In response to the Seventh Circuit's October 20, 1992, decision, American Family filed a petition for rehearing and suggestion for rehearing *en banc*. That petition addressed the panel opinion's characterization and assignment of the burden of proof under the Fair Housing Act on remand. The Court of Appeals denied the petition in an order entered on December 7, 1992. App. at 34a.

Lower courts' jurisdiction. The district court had jurisdiction over the plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343(a). It had jurisdiction over their state law claims under the doctrine of pendent jurisdiction. The Court of Appeals had jurisdiction over the plaintiffs' appeal under 28 U.S.C. § 1291.[3]

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[3] The Court of Appeals initially questioned whether it had appellate jurisdiction because it was uncertain whether the trial court's final judgment on the Fair Housing Act claim was appropriately entered under Rule 54(b). It concluded that the plaintiffs' burden of proof on that claim could be more easily sustained than their burden under their other legal theories, making their Fair Housing Act allegations a distinct claim on which the district court properly entered final judgment. App. at 8a. "If [the plaintiffs] prevail under Title VIII, they obtain all the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all other theories. . . ." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION TO APPLY THE FAIR HOUSING ACT TO HOMEOWNERS' INSURANCE CONFLICTS WITH THE FOURTH CIRCUIT, AND ITS DEFERENCE TO ADMINISTRATIVE RULES IGNORES THIS COURT'S DECISIONS.

Now, two Courts of Appeals have addressed the applicability of the Fair Housing Act to insurance companies and reached opposite results. The Fourth Circuit in *Mackey v. Nationwide Ins. Cos.*, *supra*, held that section 3604 does not apply to an insurer's refusal to sell property insurance, whatever the motivation. The Seventh Circuit has held, in contrast, that section 3604 does prohibit discrimination in the sale of homeowners' insurance. Indeed, at least for this case, the Seventh Circuit has eliminated any requirement under the Fair Housing Act that a plaintiff prove intentional discrimination in addition to disparate impact.[4] Only this Court can resolve the conflict on this issue of national importance.

A. The Fair Housing Act, As The Fourth Circuit Has Held, Does Not Apply To Insurance Sales.

The Fourth Circuit in *Mackey* refused to extend section 3604 to insurance sales for several reasons. First, it noted that section 3605 specifically prohibits discrimination in providing financial assistance. If section 3604's general "otherwise make unavailable" language were intended to "reach every discriminatory act that might conceivably affect the availability of housing," the court said, then section 3605's specific prohibition of discrimination in financing would be superfluous. 724 F.2d at 423.

The nature of insurance—its classification and rating of risks—distinguishes insurance from real estate financ-

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[4] This Court has not yet determined whether practices with a disparate impact violate the Fair Housing Act. *See Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988).

ing. While home mortgage lenders also face varying risks, sometimes depending on the neighborhood, the Fourth Circuit said, "the fact that Congress chose to proscribe discrimination in mortgage financing does not suggest that it would come to a similar conclusion with respect to hazard insurance." *Id.* Moreover, the court noted, "it has been the insistent position of Congress," expressed in the McCarran-Ferguson Act, "that regulation of the insurance industry be left to the states." *Id.*; *see infra* at 21-23.

Finally, the Fourth Circuit noted that bills to amend the Fair Housing Act to prohibit discrimination by the hazard insurance industry had been introduced in 1978, 1979 and 1980, but that none had been adopted. 724 F.2d at 424. "Since there is no reference to hazard insurance in the 1968 statute or in its legislative history," the court concluded, "the failure of the proposed amendments is supportive of our conclusion that the statute as enacted in 1968 was not intended to reach the hazard insurance industry." *Id.*

The Seventh Circuit rejected the Fourth Circuit's analysis. Section 3605's specific prohibition of discrimination in financing does not necessarily mean that section 3604 must be read narrowly, the court said, because the two sections could provide overlapping coverage. App. at 19a. The fact that insurers engage in risk classification is not a "principled ground to exclude insurers" from coverage because lenders, who also evaluate risk, are explicitly covered by the Fair Housing Act. *Id.* at 20a. Addressing *Mackey*'s final reason for holding the Act inapplicable, the Seventh Circuit found no significance in the mere introduction of unsuccessful proposals to amend the law. *Id.* at 22a-23a.

The Fourth Circuit, not the Seventh Circuit, correctly construed the Fair Housing Act. There is no doubt that Congress, when it enacted the statute, intended to attack redlining by financial institutions—section 3605 of the

Act clearly prohibits that practice.[5] It had become a pervasive problem that, Congress concluded, required federal legislation—legislation compatible, not incidentally, with the federal government's general regulation of the banking and savings and loan industries. The Court of Appeals in *Mackey* correctly recognized that Congress hardly could have intended that the Fair Housing Act apply to one national "risk" industry, insurance, through a generic phrase—"otherwise make unavailable"—while it responded to racial discrimination in another national "risk" industry, mortgage lending, with an express statutory prohibition. The Fourth Circuit reached that conclusion as much on common sense as on any rule of statutory construction. The McCarran-Ferguson Act, moreover, should make that common sense conclusion inescapable. *See infra* at 18-27.

B. The Court Of Appeals' Deference To HUD's Regulations Disregards This Court's Unanimous Decision In *Adams Fruit*.

"Congress created ambiguity," Judge Easterbrook wrote, when it prohibited discrimination "in the provision of services" for housing sales and rentals without defining "key terms." App. at 18a. Having found section 3604 ambiguous and having rejected the Fourth Circuit's analysis, the Seventh Circuit should have attempted to construe the statute based on its language and purpose. It did not. Instead, it simply deferred to HUD's construction of the statute, 21 years after its enactment, even though the Fair Housing Act has been invoked in this case not by HUD but by a private party, and even though the agency had no statutory authority to expand the scope of the law.

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[5] Congress also addressed mortgage redlining in the Home Mortgage Disclosure Act: "The Congress finds that some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions." 12 U.S.C. § 2801(a).

HUD has said the Fair Housing Act covers property and casualty insurance. Unlike the relevant provisions of the Act, the agency's regulations are not ambiguous: "Refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race," according to HUD, is prohibited by the Fair Housing Act. 24 CFR § 100.70(d)(4). For the Seventh Circuit, that decided the case.

The Court of Appeals' deference to HUD's construction of the statute conflicts with this Court's unanimous holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). Federal courts should not defer to an administrative agency's expansive interpretation of the scope of a statute's private judicial remedies, this Court said, because "an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id.* at 650, quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

In *Adams Fruit*, the Court had to decide whether the private right of action created by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 *et seq.*, remains available to injured workers if their state's workers compensation law provides an exclusive remedy for work-related injuries. The Department of Labor, which administers the statute, had issued a regulation that whenever state workers compensation remedies are available, those benefits provide the exclusive remedy for loss. 494 U.S. at 649.

Rejecting that statutory construction, this Court unanimously held that the judiciary "need not defer to the Secretary of Labor's view of the scope of [the AWPA] because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." *Id.* Deference, the Court held, has limits:

> A precondition to deference under *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

> U.S. 837 (1984),] is a congressional delegation of administrative authority. No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

Id. at 650. Although Congress "clearly envisioned, indeed expressly mandated a role for the Department of Labor in administering the statute," this Court said, that delegation "does not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id.* Accordingly, the administrative regulation was "not entitled to *Chevron* deference." *Id.*

The Seventh Circuit should have applied that rationale here. The Fair Housing Act, like the AWPA, provides individuals with "direct recourse to federal court where their rights are violated." *Id.* Under *Adams Fruit*, the Court of Appeals should have construed the Fair Housing Act without deference to HUD's interpretation. Its failure to interpret the statute independently conflicts with this Court's mandate.

The Court of Appeals did recognize that its reliance on HUD's rules at least appeared inconsistent with *Adams Fruit*:

> We can imagine the response that courts do not defer to administrative constructions when judges, rather than administrators, hold the power of enforcement. Just as Congress authorized private litigation to enforce the [AWPA], the subject of *Adams Fruit*, so the Fair Housing Act is enforced by the courts at the instance of private persons believing themselves wronged.

App. at 23a-24a (citation omitted). However, the Seventh Circuit noted, Congress provided for administrative

enforcement in the Fair Housing Act as well as judicial enforcement and that, the court believed, made this case different:

> The Secretary's regulations would receive deference in an action to enforce HUD's administrative decision. It would be weird to say that [the Fair Housing Act] applies to insurers on judicial review of administrative actions but not when the litigation begins in district court.

Id. at 24a.

The Court of Appeals failed to recognize that the federal statute at issue in *Adams Fruit* also provides for administrative enforcement in addition to private judicial enforcement. The AWPA permits the Secretary of Labor to assess monetary penalties for statutory violations and provides the person assessed the right to an administrative hearing on the charges, followed by judicial review of any administrative action. *See* 29 U.S.C. § 1853. The "no deference" rule of *Adams Fruit* cannot be limited, therefore, to statutes that provide only a private right of action, with no administrative enforcement, because the statute construed in *Adams Fruit* itself contained both administrative and private remedies.

Federal courts, both before and since the decision in *Chevron*, have given "great weight" to an agency's administrative interpretation of a statute. App. at 24a. When Congress in 1988 gave HUD the authority to "make rules . . . to carry out" the Fair Housing Act, however, it did not give HUD the authority to rewrite the statute by making it specifically applicable to insurance companies even though Congress had made it specifically applicable only to financial institutions. Nor did Congress give HUD the authority to overrule a decision of the U.S. Court of Appeals. Congress, not the executive branch, certainly could have done either—by enacting a law that expanded the Fair Housing Act and, at the same time, satisfied the McCarran-Ferguson Act's requirement

that any such law "specifically relate[] to the business of insurance." Yet Congress did neither.

II. THE McCARRAN-FERGUSON ACT PREVENTS THE FAIR HOUSING ACT'S APPLICATION TO INSURERS WHETHER OR NOT THE FAIR HOUSING ACT ACTUALLY CONFLICTS WITH ANY STATE LAW.

The McCarran-Ferguson Act embodies Congress' determination that the regulation of the insurance industry is a matter best left to the states. In "a form of inverse preemption," App. at 14a, Congress gave the states virtually exclusive authority over the "business of insurance." 15 U.S.C. § 1012(a). McCarran-Ferguson allocates that regulatory authority to the states by creating a rule of statutory construction that ensures federal statutes do not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," 15 U.S.C. § 1012(b), *unless* Congress expressly intends that result. The McCarran-Ferguson Act itself specifically made some federal legislation applicable to the business of insurance—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—but only to the extent it already "is not regulated by state law." *Id.*

In light of McCarran-Ferguson, any application of the Fair Housing Act to insurers presents two distinct issues:

1) Does McCarran-Ferguson, enacted in 1945, apply to any subsequently enacted civil rights legislation? The Seventh Circuit in this case concluded that it does, a conclusion directly in conflict with the Second Circuit's decision in *Spirt v. Teachers Ins. and Annuity Ass'n*, *supra*.

2) Assuming construction of the Fair Housing Act *is* subject to the McCarran-Ferguson Act, does McCarran-Ferguson preclude an administrative agency and, in turn, a federal court, from expanding the Fair Housing Act to permit simultaneous federal and state regulation of the insurance business? Overruling its own precedent, the Seventh Circuit held in this case that McCarran-

Ferguson tolerates dual state and federal regulation as long as the state and federal rules do not actually conflict. That conclusion collides, however, with this Court's consistent application of McCarran-Ferguson to ensure the "continued supremacy of the States" in regulating the "business of insurance." *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969).

A. The Seventh Circuit's Application of McCarran-Ferguson To Subsequently Enacted Civil Rights Laws Conflicts With The Second Circuit.

This Court has never had to decide whether the McCarran-Ferguson Act applies to subsequently enacted civil rights legislation. In *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983), however, four Justices concluded that the McCarran-Ferguson Act does apply to Title VII of the Civil Rights Act of 1964. *Id.* at 1099-1103 (Powell, J., joined by Burger, C.J., and Blackmun & Rehnquist, JJ., concurring in part and dissenting in part). The other five Justices found it unnecessary to resolve the issue because even if McCarran-Ferguson does apply to Title VII, it would not have prohibited the application of Title VII to the challenged employment practice. *Id.* at 1087 n.17.[6]

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[6] The issue in *Norris* was whether a state-administered retirement plan for state employees violated Title VII by paying women retirees lower monthly benefits than men. The majority opinion in *Norris* noted that the challenged conduct involved an employment practice, not an insurance practice, that no insurance company had been joined as a defendant, and that the Court's decision would not preclude any insurance company from offering annuity benefits determined by gender-based actuarial tables. 463 U.S. at 1087 n.17. Accordingly, the majority concluded, the application of Title VII in that case could not possibly affect any state law governing the business of insurance. It was unnecessary, therefore, to determine whether Title VII " 'specifically relates to the business of insurance' within the meaning of the McCarran-Ferguson Act." *Id.*

In this case, in contrast, the petitioner *is* an insurance company, and the challenged practices—"deciding which risks [petitioner] will accept [and] at what price," App. at 10a—are at "the core of insurance." *Id.*; *see SEC v. National Securities*, 393 U.S. at 460. This case necessarily requires, therefore, a resolution of the issue

The Courts of Appeals are now divided on the issue. In *Spirt v. Teachers Ins. and Annuity Ass'n, supra*, the Second Circuit held that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights statutes. It found the "historical context, the legislative history, and judicial interpretations of that history" dispositive. 691 F.2d at 1065. "Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as the business of insurance." *Id.*

The Seventh Circuit in this case rejected the Second Circuit's reasoning. "[*O*]*f course* Congress had no intention in the 1940s of curtailing the scope of laws yet to be enacted—indeed, inconceivable at the time." App. at 11a (emphasis in original). Yet the McCarran-Ferguson Act, the Seventh Circuit said, "could not be more comprehensive." *Id.* The statutory language "No Act of Congress" obviously does not mean "no act on the books in 1946" and certainly not "no act other than a civil rights statute." *Id.*[7]

The clash between the Second and Seventh Circuits occurs at the threshold: Does McCarran-Ferguson apply at all to the Fair Housing Act? Whether the McCarran-Ferguson Act governs the interpretation of all "Act[s] of Congress," as the Seventh Circuit concluded here, or

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on which the Second and Seventh Circuits have divided even though Judge Easterbrook accepted American Family's contention that McCarran-Ferguson does apply to all subsequently enacted federal legislation, including the Fair Housing Act.

[7] Even if the Second Circuit's restrictive interpretation of the McCarran-Ferguson Act were correct, it is clear that civil rights statutes enacted *before* 1945 still would remain subject to McCarran-Ferguson's limiting construction. The validity of the plaintiffs' section 1981 and 1982 claims under McCarran-Ferguson has not yet been addressed by the district court, and the issue was not before the Court of Appeals.

whether it has a more limited scope, as the Second Circuit believed, is an issue of national significance that only this Court can address definitively. Resolving that conflict, however, does not resolve the entire issue or this case.

Assuming the Seventh Circuit correctly held that McCarran-Ferguson reaches the entire body of federal law, the contours of its "inverse preemption" remain undefined. Does the statute permit simultaneous state and federal regulation of the business of insurance? To answer that question "yes," the Seventh Circuit had to overrule its own decision in *Lowe v. AARCO-American*, *supra*, which had reaffirmed the states' exclusive jurisdiction. Under the court's new interpretation of the McCarran-Ferguson Act, there now must be an actual conflict between state law regulating the business of insurance and a federal law that does *not* "specifically relate[] to the business of insurance," 15 U.S.C. § 1012(b), before McCarran-Ferguson bars the application of the federal law to insurers. Whether McCarran-Ferguson permits concurrent state and federal regulation of the business of insurance has become an open and troubling question as a result of the Seventh Circuit's decision in this case.

B. McCarran-Ferguson, This Court Has Held, Does Not Permit Simultaneous Federal And State Insurance Regulation, Whether Or Not There Is An Actual Conflict Between The Regulations.

The Seventh Circuit now says that the McCarran-Ferguson Act does not preclude simultaneous state and federal regulation of insurance sales practices, as long as the federal and state rules are essentially the same. That conclusion cannot be squared with this Court's repeated recognition that the McCarran-Ferguson Act assigns the entire field of insurance regulatory authority to the states, absent an explicit Congressional command to the contrary. McCarran-Ferguson, this Court has observed just recently, reflects Congress' "desire to reserve to the

States the regulation of the 'business of insurance.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 410 (1990). The deciding principle is not the presence of an actual state-federal conflict but the states' occupation of the field of insurance regulation.

In *FTC v. National Casualty Co.*, 357 U.S. 560 (1957) (per curiam), for example, the Court held that the McCarran-Ferguson Act precludes the Federal Trade Commission from enforcing federal laws against deceptive trade practices by insurance companies in states that already have their own statutes prohibiting unfair practices. The Court rejected the FTC's argument that McCarran-Ferguson does not bar federal regulation where a state has not enforced its own regulations effectively. *Id.* at 564.

The *National Casualty* opinion embodies this Court's "understanding of McCarran as an act allocating power in a federal system." Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 Utah L. Rev. 1, 20. The Court expanded on that understanding of McCarran-Ferguson in *SEC v. National Securities, Inc.*, *supra*. The purpose of the McCarran Act, the Court said, was to "turn back the clock" in response to its decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance transactions are subject to federal regulation under the Commerce Clause. That decision, the Court observed, "threatened the continued supremacy of the States in this area," *National Securities*, 393 U.S. at 459, and Congress explicitly reinstated that state supremacy by enacting McCarran-Ferguson.

Congress passed the McCarran-Ferguson Act, 59 Stat. 34 (1945), "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." 393 U.S. at 459. McCarran-Ferguson did not "make the States supreme in regulating all the activities of insurance companies," the

Court noted. *Id.* Rather, "only when [insurers] are engaged in the 'business of insurance' does the statute apply." *Id.* at 459-60.

The Court then defined the "business of insurance" for which McCarran-Ferguson does, indeed, "make the States supreme":

> Certainly the fixing of rates is part of this business. . . . The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 460.

Until this case, the Seventh Circuit honored the intent of McCarran-Ferguson and its purpose. In *Lowe v. AARCO-American*, *supra*, the plaintiffs alleged that the defendants' financing of insurance premiums violated the federal Truth in Lending Act. The court found that "[t]he particular elements of the 'business of insurance'" at issue in *Lowe* already "are regulated extensively by Illinois statutes." 536 F.2d at 1162. Accordingly, the court ruled, the McCarran Act "remov[ed] . . . [those] transactions from federal jurisdiction." *Id.* The fact that "there is no inconsistency between the Truth in Lending Act and the [state] disclosure requirements," it con-

cluded, is *not* a "compelling reason to restrict the full sway of the McCarran Act. . . ." *Id.*

By overruling *Lowe*, the Seventh Circuit's opinion in this case undermines the purpose and effect of the McCarran-Ferguson Act and this Court's application of it. The court acknowledged the "inverse preemption" of McCarran-Ferguson, App. at 14a, which is designed to ensure state supremacy in insurance regulation, and then ignored it. Permitting simultaneous federal regulation of insurers, as the Seventh Circuit now has done, nullifies the explicit determination by Congress that, unless a federal law "specifically relates to the business of insurance," the states *alone* are responsible for regulating "the business of insurance."

The Seventh Circuit did recognize that in some areas—labor law, for example—the rules of preemption prohibit any concurrent state and federal regulation. *Id.* at 13a-14a, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). That principle is inapplicable here, the court contended, because it "rest[s] on a conclusion that Congress occupied the field of labor relations. . . ." App. at 14a. In other fields, the court observed, dual state and federal regulation is permissible as long as the state and federal rules "do not conflict with or displace each other." *Id.* at 16a.

Under McCarran-Ferguson's "inverse preemption" command, the court concluded, federal regulation of the business of insurance can "invalidate, impair, or supersede" state regulation *only* if the federal law actually "displaces states' choices about the proper conduct of the business of insurance." *Id.* Dual regulation, even if it creates potential conflict, is not enough, the court held—there must be actual conflict to trigger McCarran-Ferguson. The Court of Appeals found no conflict here as long as Wisconsin law and federal law both prohibit racial discrimination in the sale of homeowners' insurance.

Wisconsin provides a comprehensive regulatory structure that unequivocally prohibits racial discrimination

by all insurance companies doing business in the state. The state insurance code prohibits unfair discrimination by insurers in setting rates or in refusing to sell policies. Wis. Stats. §§ 625.11(1), 628.34(3); Wis. Admin. Code § Ins 6.68. Those provisions are enforced administratively by the state's Commissioner of Insurance. *See* Wis. Stats. § 601.41. In addition, Wisconsin's fair housing law also prohibits discrimination by insurers, explicitly and unambiguously, and provides a privately enforceable judicial remedy. *See* Wis. Stats. §§ 101.22(2)(e),(6m)(a); *see supra*, n. 1. Expanding the federal Fair Housing Act's coverage to insurers deprives the State of Wisconsin of its exclusive authority under McCarran-Ferguson to regulate insurance sales until Congress—not a federal agency and not a federal court deferring to that agency—determines that federal regulation is necessary.

For the Seventh Circuit, there must be a substantive difference between federal and state laws before those laws can "conflict." It failed to recognize that a conflict arises between state and federal law whenever one level of government even attempts to regulate within the other's exclusive domain. As this Court observed recently, "field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). To paraphrase Judge Easterbrook, "duplication *is* conflict."

In the field of insurance regulation, federal rules that duplicate the reach of state rules "conflict" with state regulation. In the language of McCarran-Ferguson, any federal attempt to regulate the business of insurance necessarily "impairs" state regulation because it conflicts with the decision of Congress to let the states exclusively regulate the business of insurance. The Seventh Circuit failed to acknowledge that.

Simultaneous state and federal regulation inevitably produces conflict because, as this Court has observed, "a

multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garmon*, 359 U.S. at 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). This case illustrates just that point well.

The Seventh Circuit believed that there is no conflict between Wisconsin insurance law and the Fair Housing Act because both prohibit redlining in insurance sales. App. at 16a. Yet its assignment of the burden of proof on the plaintiffs' various claims creates just such a conflict. On the Fair Housing Act claim, the Court of Appeals said, the plaintiffs can prevail by proving only disparate impact, a "lighter" burden than their state fair housing law claim, where they must prove intentional discrimination. The allocation of burdens of proof in discrimination cases, the appellate court recognized, "is bound to affect many cases, given the difficulty in drawing inferences." *Id.* at 4a. By suggesting that it is easier for the plaintiffs to prevail on their federal claim, the Court of Appeals has allowed the Fair Housing Act to "supersede" the state's more stringent requirements.

This Court's new decision in *Gade v. National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S.Ct. 2374 (1992), emphasizes, moreover, that preemption does not necessarily require a conflict in laws. The Occupational Safety and Health Act of 1970 (OSH Act) permits states to develop occupational safety and health standards that, upon their approval by the Secretary of Labor, preempt federal standards. *Id.* at 2382. The issue before the Court in *Gade* was whether the OSH Act preempts state regulation of occupational safety in states whose safety and health standards have not been approved by the Secretary.

Concluding that the OSH Act does preempt such state laws, the Court's plurality opinion rejected the petitioner's argument, "drawn from Judge Easterbrook's separate opinion below, that the [OSH] Act does not pre-empt

nonconflicting state regulations at all." *Id.* at 2381 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.). After reviewing the entire statute, the plurality determined that "Congress intended to subject employers and employees to only one set of regulations" at a time, "be it federal or state. . . ." *Id.* at 2383. "[T]he only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards." *Id.*

The Seventh Circuit should have applied that analysis here. Congress enacted the McCarran-Ferguson Act to affirm the states' supremacy in regulating the "business of insurance." Section 1012(b) of McCarran-Ferguson carries out that policy by instructing courts and federal administrative agencies to avoid subjecting insurers to the burden of concurrent federal regulation *unless* Congress has enacted legislation that, in explicit and unambiguous terms, "specifically relates to the business of insurance." HUD may have tried to do that with its new regulations. The Seventh Circuit may have tried to do that with this decision. It is clear, however, that Congress has not.

The Seventh Circuit concluded its discussion of the Fair Housing Act by asking whether the HUD regulations are "tenable." App. at 24a. That question need never have been asked. The critical question is whether HUD, in light of the McCarran-Ferguson Act's requirement that a statute "specifically relate[] to the business of insurance" and the Fair Housing Act's failure to even mention insurance, had the authority to regulate the business of insurance through *any* regulations, "tenable" or not.

C. The Seventh Circuit's Decision Will Lead Inevitably To Jurisdictional Confusion And Inconsistent Regulation.

Almost 50 years ago, Congress drew a bright line between the federal government and the states to allocate

the responsibility for regulating the business of insurance. Indeed, it is difficult to imagine a brighter line than the McCarran-Ferguson Act. Just as Congress reserved for the federal government the exclusive authority to regulate labor relations in the National Labor Relations Act, it gave the states the exclusive authority to regulate the "business of insurance." It created a convenient mechanism, however, to avoid tying its hands in the future and to reserve for itself the final authority should the states fail their responsibility. Under McCarran-Ferguson, if Congress wants to regulate the business of insurance, supplementing or supplanting the regulatory authority of the states, it has only to say so in clear and explicit language. That is what McCarran-Ferguson requires. And that is precisely what has *not* happened here.

With the decision of the U.S. Court of Appeals in this case, McCarran-Ferguson's bright line has blurred. The states' regulatory authority is not exclusive after all. It is subject to concurrent regulation by the federal government—not regulation imposed by Congress but regulation imposed by a federal agency's rules and an appellate court's willingness to defer to them. The ultimate issue, of course, is not whether the bright line of McCarran-Ferguson is the right line but whether a federal court or an administrative agency, without the expressed authority of Congress, can redraw it.

There are more than 1000 insurance companies in this country that offer insurance protection against personal injury and property damage from virtually every imaginable peril. More than 96 percent of American homeowners have some form of hazard insurance, and they pay annual premiums that total over $19 billion.[8] To ensure that the "business of insurance" is conducted properly, that policies are sold and priced fairly, every state regulates the insurance companies that operate within

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[8] Insurance Information Institute, *The Fact Book*, p. 14 (1993); A.M Best Data Base Services, *Property Casualty Experience By State By Line* (1991).

its borders. Wisconsin, like most other states, has adopted statutes and regulations that explicitly prohibit and punish unfair discrimination, by race or by geography, in the sale of insurance policies. *See* Wis. Stats. §§ 101.22(2)(e), 625.11(1), 628.34(3). Indeed, the Seventh Circuit itself recognized that "Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers. . . ." App. at 26a.

There has been no finding, by the courts or by Congress, that the states have refused to acknowledge the potential for racial discrimination in the sale of insurance policies or to deal with its reality. Notwithstanding that, the Seventh Circuit with its decision has changed the McCarran-Ferguson Act. In the decision's wake, insurance practices have become subject to federal as well as to state anti-discrimination laws—in fact, to pervasive federal as well as state regulation, for their is no limiting principle anywhere in the opinion that restricts its application to the Fair Housing Act. From now on, the Seventh Circuit has held, the business of insurance is subject not only to state regulation but to *any* general federal law or regulation that does not conflict directly with those state regulations.

Since the Seventh Circuit issued its opinion in this case, the U.S. Department of Justice has undertaken a comprehensive investigation of insurance industry practices under the Fair Housing Act.[9] The Associated Press, "Department Investigating Home Insurance 'Redlining,'" Feb. 5, 1993 (available on Nexis). What had been a matter for the exclusive authority of the states under the McCarran-Ferguson Act, the regulation of the business of insurance, is no longer.

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[9] The 1988 amendments to the Fair Housing Act gave the Attorney General power to enforce the Act by bringing a civil action in district court. *See* 42 U.S.C. § 3614(a).

CONCLUSION

This case presents important questions of statutory construction—involving the Fair Housing Act, the McCarran-Ferguson Act and the power of federal agencies—that have divided the circuits. For the foregoing reasons, the Court should grant this petition for a writ of certiorari and review the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1176

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Appellants,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 90-C-759—J. P. Stadtmueller, *Judge.*

ARGUED SEPTEMBER 19, 1991—DECIDED OCTOBER 20, 1992

Before COFFEY and EASTERBROOK, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Is redlining in the insurance business a form of racial discrimination violating the Fair Housing Act? "Redlining" is charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally, enclosed

with red lines on a map). The NAACP, its Milwaukee Branch, and eight of its members contend in this class action that redlining violates the Fair Housing Act, 42 U.S.C. §§ 3601-19, and four other rules of state and federal law when insurers draw their lines around areas that have large or growing minority populations.

Plaintiffs contend that a mortgage loan usually is essential to home ownership, and that lenders are unwilling to provide credit unless the borrower obtains insurance on the house that serves as security for the loan. Higher premiums price some would-be buyers out of the market; a refusal to write insurance excludes all buyers. If insurers redline areas with large or growing numbers of minority residents, that practice raises the cost of housing for black persons and also frustrates their ability to live in integrated neighborhoods. Even if they achieve their goal, they pay extra.

The complaint asserts that American Family Mutual Insurance Company engages in redlining in and near Milwaukee. The district judge concluded that two of plaintiffs' five theories are legally insufficient. See Fed. R. Civ. P. 12(b)(6). Following *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419, 423-24 (4th Cir. 1984), he held that the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) does not apply to the property and casualty insurance business. And he held that Wisconsin would not recognize a private right of action to enforce the anti-discrimination portions of its insurance code. At the conclusion of his oral ruling, the judge entered a partial final judgment on these two theories under Fed. R. Civ. P. 54(b).

Because the district judge dismissed claims under Title VIII and Wisconsin's insurance code in advance of discovery, we must assume that plaintiffs can establish that the defendant intentionally discriminates on account of race. That is, we must assume that the plaintiffs can establish

disparate treatment and not just a disparate impact of decisions made on actuarial grounds. The distinction is important not only because the Supreme Court has yet to decide whether practices with disparate impact violate Title VIII, see *Huntington v. NAACP*, 488 U.S. 15 (1988), but also because of the nature of insurance. Insurance works best when the risks in the pool have similar characteristics. For example, term life insurance costs substantially more per dollar of death benefit for someone 65 years old than for one 25 years old, although the expected return per dollar of premium is the same to both groups because the older person, who pays more, also has a higher probability of dying during the term. Auto insurance is more expensive in a city than in the countryside, because congestion in cities means more collisions. Putting young and old, or city and country, into the same pool would lead to adverse selection: people knowing that the risks they face are less than the average of the pool would drop out. A single price for term life insurance would dissuade younger persons from insuring, because the price would be too steep for the coverage offered; the remaining older persons would pay a price appropriate to their age, but younger persons would lose the benefits of insurance altogether. To curtail adverse selection, insurers seek to differentiate risk classes with many variables.

Risk discrimination is not race discrimination. Yet efforts to differentiate more fully among risks may produce classifications that could be generated by discrimination. Recall the dispute, in both courts and journals, whether separate annuity tables for women are sex discrimination. See *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489 (1982); Lea Brilmayer, et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505 (1980). No insurer openly uses

race as a ground of ratemaking, but is a higher rate per $1,000 of coverage for fire insurance in an inner city neighborhood attributable to risks of arson or to racial animus?

A disparate treatment approach assigns burdens of proof and persuasion to the plaintiff, while a disparate impact approach places them on the insurer. Allocation of these burdens is bound to affect many cases, given the difficulty in drawing inferences. For example, a recent study by the Federal Reserve System concluded that black applicants for mortgage loans are more likely to be turned down, holding income constant. Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 Fed. Res. Bull. 859, 868-76 (1991). Is this attributable to applicants' race, to the fact that they seek loans that are larger multiples of their average wealth, or to difficulties of obtaining insurance that may (or may not) themselves have a racial component? The Federal Reserve reported data on applicants' income but not their wealth or the value of the loans sought, both important variables. The greater the uncertainty in drawing inferences, the more the placement of the burden matters. We mention this not to resolve the question but to make clear that we have not done so by indirection. All we decide is whether the complaint states claims on which the plaintiffs may prevail if they establish that the insurer has drawn lines according to race rather than actuarial calculations.

I

Appellate jurisdiction is the first question. Rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not employ a special meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be final. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Horn*

v. Transcon Lines, Inc., 898 F.2d 589 (7th Cir. 1990). Unless the court enters judgment on an entire "claim," or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. *Steve's Homemade Ice Cream, Inc. v. Stewart*, 907 F.2d 364 (2d Cir. 1990); *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986); *Horn*, 898 F.2d at 593-95.

The district judge did not discuss the legal and factual overlap between the two counts being dismissed and the three being retained and did not explain why he viewed them as separate claims. A "claim for relief" seeks redress of a distinct wrong; a distinct legal underpinning differs from a new claim and is not independently appealable. *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 725 F.2d 1140, 1142-43 (7th Cir. 1984). Yet the district judge appears to have equated theories with claims. He observed that because a trial lay more than a year in the future there was ample time to resolve these two legal disputes on appeal so that all theories could be handled during one trial. This suggests that the judge confused Rule 54(b) with 28 U.S.C. § 1292(b), which permits a court to certify the case for discretionary appeal when interlocutory resolution of important issues could advance the final disposition of the litigation. Because of the mismatch between the district court's stated rationale and the scope of Rule 54(b)—and the apparent overlap of the two dismissed counts with the three retained—our jurisdiction is in doubt.

Plaintiffs' complaint begins with 66 paragraphs and then states five "claims," each of which incorporates these paragraphs and asserts one reason why the conduct is wrongful. The Fair Housing Act and the state insurance code are two. The other three: Wisconsin's Fair Housing Act, 42 U.S.C. § 1981 (the right to be free of racial discrimination in making contracts), and 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying

real property). Perhaps the judge was led astray by the structure of the complaint. Identifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of "claim for relief" in the federal rules. Putting each legal theory in a separate count is a throwback to code pleading, perhaps all the way back to the forms of action; in both, legal theory and facts together created a "cause of action." The Rules of Civil Procedure divorced factual from legal aspects of the claim and replaced "cause of action" with "claim for relief" to signify the difference. *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). A complaint should limn the grievance and demand relief. It need not identify the law on which the claim rests, and different legal theories therefore do not multiply the number of claims for relief.

One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, No. 91-1247 (7th Cir. Aug. 28, 1992), slip op. 8-11. Plaintiffs could not litigate and lose a suit asserting that American Family's redlining violates Title VIII, pursue another asserting that redlining violates § 1981, and then crank up a third asserting that redlining violates § 1982. If these principles—well understood when dealing with the preclusive effects of judgments—define a "claim" for purposes of Rule 54(b), then this appeal must be dismissed.

Language in some of our cases equates "claim" in Rule 54(b) with "claim" for purposes of res judicata, but as we observed in *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990), this equivalence cannot accommodate the many cases that permit separate appeals of claims and compulsory counterclaims. E.g., *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 452 (1956). It

follows that two "claims" may arise out of the same transaction for purposes of Rule 54(b), provided that the facts and theories are sufficiently distinct. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1237 (7th Cir. 1990), remanded, 112 S. Ct. 40 (1991), after remand, 952 F.2d 965 (7th Cir. 1992). Two legal theories sufficiently distinct that they call for proof of substantially different facts may be separate "claims." *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1108-09 (7th Cir. 1984); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702-03 (7th Cir. 1984).

"Sufficiently" and "substantially" are hedges. Ideally the facts and theories separated for immediate appeal should not overlap with those retained; to the extent they do, the court of appeals is "deciding" claims still pending in the district court, and may have to cover the same ground when the district court acts on the residue. A combination of anticipation with overlap leads to wasteful duplication and increases the likelihood of conflict (or error). In disdaining bright lines and asking how much duplication is too much, we enter the zone of shadings traditionally committed to a district judge's discretion. So the Supreme Court emphasized in *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8-10 (1980).

Although the district judge in our case confused Rule 54(b) with § 1292(b), we do not believe that he abused his discretion in permitting an immediate appeal. American Family stated, in its memorandum concerning appellate jurisdiction, that "the dismissed Fair Housing Act claim, would, if it were viable, be subject to proof under a disparate impact formula, rather than under the 'intentional racial discrimination' test applicable to all the counts remaining in the district court." *Huntington and Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990), show that this concession may have been imprudent, and American Family has tried to recant. But the parties shared this belief in the district court, and the

district judge may well have relied on its when deciding to enter judgment under Rule 54(b). Retraction thus comes too late—not only for purposes of this appeal, but also for the whole case. (Treating American Family's concession as binding on appeal but not back in the districa court would create precisely the wasted effort that Rule 54(b) is set against.) We therefore assume that plaintiffs' burden under Title VIII is lighter than their burden under the other legal theories. Different burdens may imply different "claims" even for purposes of preclusion. E.g., *Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *United States v. 89 Firearms*, 465 U.S. 354 (1984); cf. *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990). Resolving the Title VIII issue in plaintiffs' favor implies that the other legal theories will fall away. If they prevail under Title VIII, they obtain all the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all other theories; either way, there will not be duplicative appellate review. *Stearns* holds that this is enough, if barely, to justify treating a legal theory as a "claim" for purposes of Rule 54(b).

One additional jurisdictional problem needs attention. American Family insists that there is no case or controversy within the meaning of Article III because none of the plaintiffs has been unable to buy a house. This is strictly a constitutional argument, for the definition of "aggrieved person" in Title VIII, 42 U.S.C. § 3602(i), eliminates any prudential barriers to adjudication. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 98-99 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982). Congress amended the statute in 1988 to authorize suit by anyone who "believes that [he] will be injured by a discriminatory housing practice that is about to occur", § 3602(i)(2), and unless this statute is unconstitutional several of the plaintiffs (and the NAACP itself, as an organization whose members include many black persons in the housing market) have standing.

After *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), any litigant must show how he has been injured. Because this case was dismissed on the pleadings, "general factual allegations of injury resulting from the defendant's conduct may suffice". *Id.* at 2137. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 n.3 (1992). Paragraph 47 of the complaint implies that lack of insurance delayed one of the plaintiffs in closing on a house; delay in obtaining a valuable thing is an injury. So is paying a higher price for insurance or any other good or service. Plaintiffs cannot rest on their pleadings; once jurisdiction is contested (as it had been here) "each element [essential to justiciability] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof". *Lujan*, 112 S. Ct. at 2136. If they can prove the essential allegations of the complaint, however, plaintiffs have standing.

II

Any effort to use federal law to prescribe or penalize the behavior of insurers must reckon with the McCarran-Ferguson Act. Section 2(b) of this statute, 15 U.S.C. § 1012(b), provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance". American Family is engaged in the business of insurance; plaintiffs complain about how, and at what price, American Family writes (or declines to write) policies of insurance. The McCarran-Ferguson Act establishes a form of inverse preemption, letting state law prevail over general federal rules—those that do not "specifically relate[] to the business of insurance." Title VIII does not mention insurance and therefore cannot apply to its endeavors, American Family concludes. Plaintiffs rejoined at oral argument that racial discrimination is not insurance. The Fair Housing Act requires race-blind

practices in housing and related services; it does not tell anyone how to write insurance and therefore does not regulate the business of insurance, plaintiffs conclude.

Doubtless there is a difference between the business of insurance and the business of insurers. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 230 n.38 (1979). But it is not helpful to point to a practice forbidden by federal law (here, racial discrimination) and observe that this practice is not itself insurance. Discrimination is not insurance, but then neither is a conspiracy in restraint of trade. By such a maneuver we could declare that the antitrust laws apply with full rigor to the insurance industry; yet the main target of the McCarran-Ferguson Act was *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which applied the antitrust laws to insurance. Plaintiffs say that the Fair Housing Act tells American Family how to behave in deciding which risks it will accept, at what price, in its dealings with potential insureds; that is the core of insurance.

A stronger argument appears in plaintiffs' reply brief: that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights statutes. This submission has the support of *Spirt v. Teachers Insurance and Annuity Ass'n*, 691 F.2d 1054, 1064-66 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983), on remand, 735 F.2d 23 (1984), and a few decisions by district courts. The second circuit wrote:

> We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had

> no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance."

691 F.2d at 1065. Well *of course* Congress had no intention in the 1940s of curtailing the scope of laws yet to be enacted—indeed, inconceivable at the time. (After southern states regained representation in the Senate following the Civil War, no civil rights laws were enacted until 1957. See 71 Stat. 634). What Members of Congress may have "intended" in 1945, when it enacted a statute limited to the antitrust laws, and 1946, when it extended the McCarran-Ferguson Act to other federal laws, is not, however, the question. We must determine what Congress meant *by what it enacted*, not what Senators and Representatives said, thought, wished, or hoped. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989). Cf. *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147-49 & n.7 (1991); *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539, 1545-46 (1991). What Congress passed and the President signed—what the second circuit never quoted—is that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." "No Act of Congress" differs from "no act on the books in 1946" or "no act other than a civil rights statute."

"No Act of Congress" could not be more comprehensive. The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a "plain statement" approach. We had no difficulty applying the Act to subsequent legislation such as the Truth in Lending Act. *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976). The second circuit posed the wrong question when inquiring whether Congress meant to insulate the insurance business from civil rights laws. Congress did

not tie its hands; instead it prescribed the consequences of silence and specificity in other acts past and future. Federal laws that do not conflict with or supersede state rules always apply; federal laws inconsistent with state laws apply when Congress says so directly. Plaintiffs' problem is that Congress did not say so, even obliquely, in the Fair Housing Act.

Spirt and all of the district court decisions reaching a similar conclusion predate *Norris*, in which four Justices concluded that the McCarran-Ferguson Act applies to Title VII of the Civil Rights Act of 1964. 463 U.S. at 1099-1103 (Powell, J., joined by Burger, C.J., and Blackmun & Rehnquist, JJ., concurring in part and dissenting in part). The other five Justices found it unnecessary to address the issue. *Id.* at 1087 n.17. No Justice disagreed with Justice Powell, then or since. *Spirt* also predates *Pilot Life Insurance*, in which all nine Justices concluded that the McCarran-Ferguson Act applies to the Employee Retirement Income Security Act of 1974. Written a decade ago, *Spirt* might have looked to *Mitchum v. Foster*, 407 U.S. 225 (1972), which held that 42 U.S.C. § 1983 is specific enough to satisfy the Anti-Injunction Act, 28 U.S.C. § 2283. More recent cases have declined to extend the approach of *Mitchum* to create other exceptions to § 2283. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Bolingbrook v. Citizens Utilities Co.*, 864 F.2d 481 (7th Cir. 1988); see also Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. Chi. L. Rev. 717 (1977). No Justice has suggested using *Mitchum* as a model approach to statutes other than § 2283. Perhaps the second circuit will take a new look at *Spirt* if the problem comes up again. No matter how our colleagues on the east coast would approach the subject today, however, we conclude that Congress should be taken at its word. The Fair Housing Act is an "Act of Congress" that does not "specifically relate[] to the business of insur-

ance". It therefore does not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance".

Although American Family insists that this conclusion ends the case, it does not. What state law regulating the business of insurance does Title VIII "invalidate, impair, or supersede"? None that we could find. American Family points to two: Wis. Stat. § 101.22(2)(e), which forbids discrimination by casualty insurers on the basis of race, and Wis. Stat. § 628.34(3), which more generally interdicts "unfair discrimination" in the business of insurance. Although American Family insists that it is "of no importance" that "these statutes may not be inconsistent with the Fair Housing Act", this is hard to swallow. Literalism cuts both ways. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (a preemption clause should be taken seriously, but such a clause also implies the absence of additional grounds of preemption). Having stood on the text to show that the McCarran-Ferguson Act governs the construction of the Fair Housing Act, American Family needs to show that the Fair Housing Act conflicts with state law. Duplication is not conflict.

Undoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures. *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2385-86 (1992). Wisconsin forbids "unfair discrimination" but, as we conclude in Part IV, did not create a private right of action to enforce this prohibition. Laws enforced only by administrative agencies with limited budgets are less potent than laws enforced by both agencies and private litigants. One could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of violation) conflicts with a decision by the state that remedies should be limited or rare. It is on reasoning of this sort that the Supreme Court does not allow states to forbid most con-

duct that is "arguably prohibited" by federal labor laws. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). Cf. *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 228-29 (7th Cir. 1992).

Principles of labor law do not transfer to other subjects, however. *Garmon* and similar opinions rest on a conclusion that Congress occupied the field of labor relations, so that it remains only to decide which state laws regulate "labor relations" and which address broader subjects (such as criminal violence) that intersect with but do not displace federal rules. In the main, federal regulation of a subject—even thoroughgoing federal regulation—does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.

Consider nuclear power. National law regulates almost every nook and cranny of industries handling radioactive materials. Yet the Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that states may require firms engaged in this business to pay punitive damages for violating norms of state law duplicating those of federal law, even on the assumption that federal law sets a much lower cap on monetary liability. See also *English v. General Electric Co.*, 496 U.S. 72, 88-89 (1990). National law also regulates the competitive behavior of firms engaged in interstate commerce. The Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers may not recover under the antitrust laws because such recoveries would unduly complicate litigation and undermine the deterrent force of those laws. Nonetheless, the Court unanimously held in *California v. ARC America Corp.*, 490 U.S. 93 (1989), that states may require offenders to pay damages to indirect purchasers, on top of the treble damages federal law requires them to

pay to direct purchasers. Federal law regulates the advertising of cigarettes and expressly bars states from prescribing different or additional disclosures; nonetheless, states may award damages for fraud in selling this product. *Cipollone*, 112 S. Ct. at 2623-24. The catalog may be extended at will. E.g., *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (medical safety); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 502-05 (7th Cir. 1989) (tender offers); *Air Line Pilots Ass'n v. UAL Corp.*, 874 F.2d 439, 446-47 (7th Cir. 1989) (interaction of labor and corporate law).

Considerations of this kind led the fourth circuit to hold in *Mackey* that application of the Fair Housing Act to insurance would not impair or supersede any state law, although North Carolina, like Wisconsin, forbids discriminatory rates in the insurance business. 724 F.2d at 421 nn. 1 & 2. (*Mackey* went on to hold that the Fair Housing Act does not apply to property insurance, a subject to which we return.) The only obstacle to joining that conclusion is our opinion in *Lowe*. After holding that the rule of construction in the McCarran-Ferguson Act applies to the Truth in Lending Act, and observing that Illinois required insurance brokers and premium finance companies to make the same disclosures as the Truth in Lending Act did, we wrapped up: "Since Illinois has regulated this aspect of the 'business of insurance' in the same manner as would the Truth in Lending Act, there is no compelling reason to restrict the full sway of the McCarran Act in this case." 536 F.2d at 1162. Without further explanation, *Lowe* affirmed a judgment dismissing a suit filed under the Truth in Lending Act.

Lowe's unstated premise is that a federal statute duplicating the terms of state law "invalidate[s], impair[s], or supersede[s]" state law. *Lowe* did not explain why and cited no authority. This omission has opened *Lowe* to criticism by the fifth circuit, *Cochran v. Paco, Inc.*, 606

F.2d 460, 466 (5th Cir. 1979). Cases such as *Silkwood* and *ARC America* decided in the 16 years since *Lowe* show that state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other. To the extent *Lowe* holds the contrary, it is overruled.

Nothing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance. If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable. American Family has not drawn to our attention, however, any law, regulation, or decision in Wisconsin requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law. Cf. *FTC v. Ticor Title Insurance Co.*, 112 S. Ct. 2169 (1992). No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy. Although the McCarran-Ferguson Act gives states the final word on the regulation of insurance unless Congress specifically overrides their choices, Wisconsin's word is consistent with the Fair Housing Act.

III

According to the plaintiffs, three sections of the Fair Housing Act address insurance sold (or withheld) in connection with the purchase of a dwelling: 42 U.S.C. §§ 3604(a), 3604(b), and 3605. Section 3605 requires the least discussion. It provides:

> (a) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction,

because of race, color, religion, sex, handicap, familial status, or national origin.

(b) As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

It would strain language past the breaking point to treat property or casualty insurance as "financial assistance"—let alone as assistance "for purchasing . . . a dwelling". Insurers do not subsidize their customers or act as channels through which public agencies extend subsidies. They do not "assist" customers even in the colloquial sense that loans are "assistance" (a lender advances cash, with repayment deferred). Payment runs from the customer to the insurer. Insurance is no more "financial assistance" than a loaf of bread purchased at retail price in a supermarket is "food assistance" or a bottle of aspirin bought from a druggist is "medical assistance."

Section 3604 makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services* or facilities *in con-*

> *nection therewith*, because of race, color, sex, familial status, or national origin.

Plaintiffs rely on the portions of these sections that we have italicized. They contend that by refusing to write policies (or setting a price too dear) an insurer "make[s a dwelling] unavailable" to the potential buyer. Lenders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable. Cf. *Cartwright v. American Savings & Loan Ass'n*, 880 F.2d 912 (7th Cir. 1989). Plaintiffs also submit that property insurance is a "service" rendered "in connection" with the sale of the dwelling. If the world of commerce is divided between "goods" and "services," then insurers supply a "service." "[I]n connection" may be read broadly, and should be (plaintiffs contend) to carry out the national goal of removing obstacles to minorities' ownership of housing. There you have it.

Nothing in the text of the statute permits us to reject these proposed readings. The Fair Housing Act does not define key terms such as "service" and "make unavailable". By writing its statute in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence—Congress created ambiguity.

Although § 3604 could bear the reading plaintiffs propose, it need not. It does not mention insurers or forbidden devices. Plaintiffs would like us to embrace the "remedial purpose" of the statute. Title VIII indeed is designed to root out racial discrimination in the housing market. Whether it reaches insurers, however, is not something a general reference to purpose discloses. One can always do "more" in pursuit of a goal, but statutes have limits. You cannot discover how far a statute goes by observing the direction in which it points. "Finding the meaning of a statute is more like calculating a vector

(with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone). Cf. *Walton v. United States Consumers Club, Inc.*, 786 F.2d 303, 310-11 (7th Cir. 1986); *Mercado v. Calumet Federal Savings & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985)." *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). See also *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

After denying that "remedial purpose" alone extends the statute to insurance, the fourth circuit in *Mackey* gave several reasons why it believed that § 3604 does not apply. The first is that § 3605 shows that § 3604 must be read narrowly. "If § 804 [§ 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, § 805's specific prohibition of discrimination in the provision of financing would have been superfluous." 724 F.2d at 423. The court's unstated assumption is that statutes never overlap. Section 3605 then shows that § 3604 does not cover lending, and by implication does not cover much at all. Yet why should we suppose that sections of a statute do not overlap? See *United States v. Naftalin*, 441 U.S. 768, 778 (1979) ("that there may be some overlap is neither unusual nor unfortunate."). Conveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out. Using the instance to restrict the principle would gum up the process of communication, inverting every effort to clarify.

As a second reason for treating § 3604 as inapplicable to insurance, *Mackey* observed that "[t]he insurance industry has traditionally classified risks. If insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks

which are perceived to be excessively high, while charging higher premiums on some risks than upon others." 724 F.2d at 423. If the question were whether to subject redlining by insurers to evaluation under the disparate impact paradigm, this consideration might be important. As we suggested at the outset, classification of risks is important to insurance, and assigning higher rates to greater risks differs from assigning rates by race. Nothing in the nature of insurance implies that hazard insurers need to engage in disparate treatment, to draw lines on the basis of race rather than risk. The fourth circuit could have said much the same thing about lenders as it said about insurers. A lender must evaluate the risk that the borrower will not repay, and higher probability of nonpayment implies a higher rate of interest (or a lower probability of extending credit). Title VIII indisputably applies to lenders, and it is difficult to see risk classification as a principled ground to exclude insurers.

Mackey also stressed the omission from both § 3604 and its legislative history of any reference to insurance. Because § 3604 uses the passive voice, however, it omits reference to any person. Insurers, escrow agents, title searchers, and so on are treated alike. The fourth circuit ultimately concluded that "service" in § 3604 means no more than "garbage collection and other services of the kind usually provided by municipalities", 724 F.2d at 424, but Congress did not mention either garbage collectors or municipalities in § 3604. *Selective* omission might be telling, but the universal omission that accompanies passive construction does not distinguish insurers from others. We once suggested in passing, *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984), that "service" in § 3604 means "services generally provided by governmental units," but the subject was not before us—and the suggestion that § 3604 is *limited* to governments is hard to reconcile with another plain-statement principle requiring Congress to be

especially clear if it wants to regulate the conduct of state and local governments. E.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2406 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1989). A statute that does not mention state governments applies exclusively to private actors. So it is hard to understand § 3604 as restricted to garbage collection and like services. See also *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991) ("service" in § 3604 means services in connection with the acquisition of housing, not its maintenance; § 3604 therefore does not apply to elevator repair services).

Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply to insurers. Silence equally could imply that the debate was about the principle of non-discrimination, leaving details to the future. The backward phraseology of § 3604 suggests the latter possibility. What was in the heads of the legislators is not, however, the measure of their enactment. Only the statute, and not the debates, is part of the United States Code. Persuasive evidence that Congress embedded terms of art in the text might lead us to confine its scope, *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154 (7th Cir. 1990), but what did not happen during the debates hardly shows that any word in the enacted text carries a special meaning.

In 1980 the silence was broken. A district court concluded that the Fair Housing Act covers property insurers. *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979). Some Members of Congress sought to amend Title VIII to "clarify" that *Dunn* correctly understood its scope. The effort was beaten back. See *Mackey*, 724 F.2d at 423-24 (summarizing these events). The fourth circuit inferred that Congress disapproved of *Dunn*. That conclusion is unwarranted. Proposed legislation can fail for many rea-

sons. Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the "clarification" into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance. E.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). See also *United States v. Marshall*, 908 F.2d 1312, 1318-19 (7th Cir. 1990) (in banc), affirmed under the name *Chapman v. United States*, 111 S. Ct. 1919, 1927 n.4 (1991). Were it otherwise, one House of Congress could change the meaning of a law by refusing to approve a change in the text. Yet Congress may change the law only by bicameral action, *INS v. Chadha*, 462 U.S. 919 (1983), which implies that the refusal of one chamber to assent to a proposed amendment cannot alter the meaning of the law on which both chambers agreed in prior years.

By parallel reasoning, we dispatch American Family's argument that legislative failure to overturn *Mackey* is significant. Interest groups alert Congress to many judicial decisions, and the legislature frequently alters the law to countermand opinions that do not find favor in today's political climate. During the last quarter century, Congress has interred an average of 15 opinions per year, about two-thirds of these opinions by the inferior courts. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 338 (1991). Courts of appeals and district courts issue tens of thousands of opinions yearly, however, so an opinion has to stir up a hornets' nest to get on the agenda. Most of the time, Congress waits to see whether a higher court will reach a different conclusion. *Mackey* appeared on the

agenda, but some Members of Congress opposed the proposal to change Title VIII. Members of Congress expressed conflicting views, but Congress as an institution took a pass. That decision carries no significance.

Congress has not been inactive since *Mackey*, however. In 1988 it enacted amendments to the Fair Housing Act, authorizing the Department of Housing and Urban Development to "make rules . . . to carry out this subchapter." 42 U.S.C. § 3614a. Congress gave the Executive Branch this power with knowledge that since 1978 a succession of Secretaries have believed that "[i]nsurance redlining, by denying or impeding coverage[,] makes mortgage money unavailable, rendering dwellings 'unavailable' as effectively as the denial of financial assistance on other grounds". Memorandum by the General Counsel of HUD, quoted in *Dunn*, 472 F. Supp. at 1109. The Secretary deployed this new rulemaking power in the predictable way, issuing regulations that include, among the conduct prohibited by § 3604: "Refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race". 24 C.F.R. § 100.70 (d)(4). The United States has filed a brief as *amicus curiae* to support the plaintiffs' position in this case.

Section 3604 is sufficiently pliable that its text can bear the Secretary's construction. Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534-36 (1991). We can imagine the response that courts do not defer to administrative constructions when judges, rather than administrators, hold the power of enforcement. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Just as Congress authorized private litigation to enforce the Migrant and Seasonal Agricultural Worker Protection Act, the subject of *Adams Fruit*, so the Fair Housing Act is enforced by the courts

at the instance of private persons believing themselves wronged.

Among the amendments in 1988, however, was a provision for administrative enforcement paralleling judicial enforcement. 42 U.S.C. §§ 3610-12. The Secretary's regulations would receive deference in an action to enforce HUD's administrative decision. It would be weird to say that Title VIII applies to insurers on judicial review of administrative actions but not when the litigation begins in district court. Long before *Adams Fruit*, indeed long before the Secretary had the power to issue regulations and adjudicate complaints under Title VIII, the Supreme Court declared that the Secretary's views about the meaning of that statute are entitled to "great weight". *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Gladstone*, 441 U.S. at 107.

Events have bypassed *Mackey*. We have expressed doubt about the interpretive methods used in that opinion. No matter how a court should have understood the Fair Housing Act in 1984, however, the question today is whether the Secretary's regulations are tenable. They are. Section 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.

IV

Plaintiffs contend that redlining violates state law in two ways. First, they believe, redlining entails racial discrimination forbidden by Wis. Stat. § 101.22(2)(e). Second, they contend, redlining is an "unfair" practice that offends several provisions of the Insurance Code. American Family concedes that plaintiffs are entitled to enforce § 101.22(2)(e) in private litigation but denies that statutes and regulations speaking more generally about "unfair" practices create private rights of action. The district court agreed with this submission and dismissed the complaint to the extent it relied on Wis. Stat. §§ 625.11(1)

and 628.34(3), and Wis. Adm. Code INS 6.68. Our review is plenary. *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

Section 625.11(1) forbids "unfair discrimination" in the setting of rates but does not specify what unfair discrimination consists in. Section 628.34(3) bans differentials in premiums and coverages unless based on "classifications related to the nature and the degree of the risk covered and the expenses involved". Regulation INS 6.68 adds a bit of specificity to these open-ended statutes. Plaintiffs rely particularly on INS 6.68(3)(a), which identifies the following as "unfairly discriminatory" for purposes of the insurance statutes:

> Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:
>
> 1. The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or
>
> 2. The refusal, cancellation or limitation is required by law or regulatory mandate.

Redlining is a distinction based on the "geographic location of the risk" and hence unlawful in Wisconsin as "unfairly discriminatory" unless "for a business purpose which is not a mere pretext for unfair discrimination".

Neither of these statutes, nor regulation INS 6.68, specifies private litigation or provides a remedy in damages. Each regulates general business practices and leaves much to the discretion of whoever must determine what is "unfair" or "for a business purpose". Like charges to a federal agency to identify the "public interest, convenience, and necessity," these rules read more like descriptions of

an agency's turf than like individual rights to be enforced in litigation.

No court of Wisconsin has permitted anyone to enforce provisions of this kind in the insurance laws through private litigation. Plaintiffs observe that many state cases say that a remedy accompanies every right, e.g., *Urwan v. Northwestern National Life Insurance Co.*, 125 Wis. 349, 103 N.W. 1102 (1905), and that *Yanta v. Montgomery Ward & Co.*, 66 Wis. 2d 53, 224 N.W.2d 389 (1974), allowed a victim of employment discrimination to obtain a remedy, back pay, not mentioned in the statute creating the right of action. Our concern, though, is not whether there is *some* remedy for violations of state law—for Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers—or whether the statutes provide one measure of damages rather than another. It is whether courts, rather than the regulators, are the right institutions to identify "unfair discrimination" and "business purpose" in this market.

Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 307 N.W.2d 256, 268-70 (1981), persuades us that Wisconsin wants such contentions submitted to administrators rather than judges. Kranzush complained that, even though its insured obviously was negligent and had to compensate the victim of an auto accident, an insurance company stalled until the victim died; such manipulation, the administrator of the estate contended, violated Wis. Adm. Code INS 6.11(3)(a)4, which makes it an "unfair practice" for an insurer to fail "to attempt in good faith to effectuate fair and equitable settlement of claims submitted in which liability has become reasonably clear." The Supreme Court of Wisconsin held that enforcement of administrative rules defining unfair practices is for administrative officials, which can revoke an insurer's license or impose other penalties. Wis. Stat. § 601.64(3)(c) and (4) set out penalties for transgressions against insurance statutes and rules; damages in private actions are not among them. Although *Kran-*

zush mentioned that a separate provision for administrative remedies in INS 6.11 fortified the conclusion that the administrative route was exclusive, 103 Wis. 2d at 80, 307 N.W.2d at 268, the court also emphasized that the rule defined unfair practices, a subject the justices thought best handled by the Commissioner of Insurance and the staff of that office.

Perhaps the Supreme Court of Wisconsin ultimately will conclude that the specification of an administrative remedy in INS 6.11 distinguishes that section from INS 6.68. Extensions of state law are best left to state courts. This is a case about racial discrimination, and plaintiffs will have ample opportunity to prove their claims under both state and federal law.

V

Because this opinion overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and because it conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*, it was circulated before release to all judges in active service. See Circuit Rule 40(f). No judge requested a hearing in banc.

The judgment of the district court is affirmed to the extent it holds that there is no private right of action to enforce Wis. Stat. §§ 625.11(1) and 628.34(3), and Wis. Adm. Code INS 6.68. The judgment is reversed to the extent it holds that the Fair Housing Act is inapplicable to property and casualty insurance written or withheld in connection with the purchase of real estate. The case is remanded for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil No. 90-C-0759

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANNE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons, *Plaintiffs*,

vs.

AMERICAN FAMILY MUTUAL INSURANCE CO., and JOHN DOES 1 through 20, and XYZ CORPORATION, *Defendants.*

TRANSCRIPT OF HEARING ON DEFENDANT'S MOTIONS TO DISMISS AND FOR RULE 11 SANCTIONS

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on December 11, 1990, commencing at 1:35 p.m.

* * * *

[36] THE COURT: Thank you. Well, based upon my review of the entirety of this issue, let me begin with a few general observations. First of all, I appreciate counsel's efforts to bring to the court the relevant authority that you believe are [37] instructive and perhaps controlling with regard to this court's disposition of this motion.

On the one hand I have considerable personal empathy and sympathy for those who find themselves in the shoes of the plaintiffs, unable to secure what not only the Fair Housing Act but these other statutory enactments have allowed them or created vehicles for them to insure that

these valuable rights that Congress has created are rightfully delivered.

But on the other hand to follow up on a comment that Mr. Shriner made from the *Bethlehem Steel* case, so also it is not entrusted to the courts to enact legislation where Congress has either shirked or otherwise erred in its responsibilities. And with regard to the matter of the Fair Housing Act claim, I am constrained in the factual setting that has been presented to the court in the pleadings as well as the comments that both sides have drawn upon in the legislative history as well as what I believe to be the most significant case in this area, namely, *Mackey versus Nationwide Insurance Company*, to grant the defendant's motion to dismiss Count One.

I do so because the United States Congress on more than one occasion has had an opportunity to amend the statute subsequent to *Mackey*. In fact, amendments were proposed again in 1987. And Congress in its own inimitable fashion chose to duck the issue for lack of a better description and [38] chose not to include it in the final legislation that was enacted.

Similarly with regard to the matter of the court giving due deference to these HUD regulations that have been recently promulgated, the regulations may be well and good and well-intended, but the fact of the existence of the regulations without any statutory authority specifically authorizing those types of regulations I find totally undermines any reliance on those regulations in the context of this particular case, particularly against the backdrop of senators from both sides of the aisle, and I make reference to Senator Heflin and Hatch having chastised the Department of Housing and Urban Development back in 1980 for their attempts to administratively work into the regulatory scheme matters that relate to the matter of insurance coverage.

And so there is considerable amount of undercurrent that exists with regard to plaintiffs true reliance on some of these matters that while they have been certainly de-

bated in the halls of the legislature and through committee, the reality is Congress in its wisdom has seen not to enact legislation specifically relating to insurance.

I do not find a great deal of credence to be drawn from the comment of Judge Bauer in the *Southend* case. As defendants correctly point out, no authority was cited in the footnote for reference to insurance "redlining." In point of [39] fact, much of what has been developed in this area was quite available if the court seriously wanted to draw upon that analogy in its ultimate decision in the *Southend* case. And I dare say it's a rather open question whether it was wise to have included insurance "redlining" when it came to the Fair Housing Act. It may be applicable under one or more of the other claims that remain viable, but I do not find it at all within the ambit of section 34 or—strike that, 34 or 35 of the Fair Housing Act; and, accordingly, I am compelled to grant a dismissal as to Count One.

I'm going to ultimately deal with this in a manner that will allow plaintiffs to immediately take this issue up to the Seventh Circuit if they so elect. This case is not going to be resolved in the near term. In fact, we'll take up the matter of scheduling at the conclusion of my ruling with regard to the insurance claim.

With reference to the insurance claim, the issue I think is a little more close than it is with regard to the matter of the Fair Housing Act claims. And the reason that I say so is that as counsel are aware, and I think at some point one or more of you may have cited this by way of analogy in your written submissions, there's disagreement even among myself and my fellow judges with regard to a private right of action under the Wisconsin Fair Employment Act in the federal courts.

I believe the issue is still up on appeal in the Seventh [40] Circuit. I'm not aware that it has been resolved at the appellate level; and I think truly that there is some argument, although very limited, that one could advance to suggest that plaintiffs have a cause of action under the Wisconsin insurance regulatory system.

However, I don't believe that that slight authority by way of analogy sufficiently overcomes my judicial conservatism in recognizing, for example, that had the Wisconsin legislature wanted to create a private right of action with regard to the matter of redress under the Wisconsin insurance regulatory scheme, that they would not have so much as said so. For example, as the legislature created a direct right of action against an insurance company in connection with a tort or other action that would allow an insured or a third party to proceed directly against an insurance carrier.

The same holds true in my view by way of analogy with regard to what plaintiffs perceive to be a private right of action in the context of this factual setting presented in this case. That is to say, had the Wisconsin legislature at the time or subsequently by way of amendment chosen to grant plaintiffs or those similarly situated with such right, they certainly could have chosen to do so.

And in essence what is really being sought here is a judicial imprimatur or fiat with regard to whether or not the causes of action stated in the first claim and the fifth claim [41] survive what has been enacted by the legislatures both in Wisconsin and in the Congress. And I am compelled, albeit reluctantly, to conclude that the legislature has not granted the plaintiffs the vehicle by which they have presented their claims in the first and fifth causes of action.

Having made those findings, I'm going to direct that my clerk enter a judgment in this case pursuant to Rule 54 (b) of the Federal Rules and that that judgment run in favor of the defendant as to both the first and fifth causes of action. And that judgment be a final judgment since I am at the same time expressly determining pursuant to Rule 54(b) that there is no just reason for the delay of entry of judgment as to the first and fifth causes of action until final determination of the balance of the claims set forth in the complaint.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 90-C-759

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL INSURANCE CO.,
Defendant.

ORDER

[Filed Dec. 17, 1990]

This matter came on for hearing on December 11, 1990 upon the defendant's motions to dismiss and for Rule 11 sanctions. The plaintiffs appeared by john powell, William H. Lynch, James H. Hall, Jr., and Curry First. The defendant appeared by Thomas L. Shriner, Jr., Richard M. Esenberg, and Robert C. Burrell. Amicus curiae United States of America appeared, by special leave of the Court, by Joseph D. Rich and Conrad Schneider. Having heard the oral arguments of counsel and considered the briefs of the parties and amici curiae, and for the reasons stated on the record in open court, the Court entered the following orders:

1. The defendant's motion to dismiss the first and fifth claims of the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state claims upon which relief can be granted, is GRANTED.

2. Upon its own motion, the Court, pursuant to Fed. R. Civ. P. 54(b), expressly DIRECTS the Clerk to enter a final judgment dismissing the first and fifth claims of the complaint, having expressly determined that there is no just reason for delay in the entry of the judgment.

3. The defendant's motion for an order, pursuant to Rule 11, Fed. R. Civ. P., requiring the plaintiffs to pay the defendant its costs incurred in bringing the motion to dismiss the fifth claim is DENIED.

Done at Milwaukee, Wisconsin this 17th day of December, 1990.

BY THE COURT:

/s/ J. P. Stadtmueller
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 7, 1992

HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 91-1176

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Appellants,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 90-C-759—J.P. Stadtmueller, *Judge.*

ORDER

Defendant-Appellee filed a petition for rehearing and suggestion of rehearing en banc on November 3, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.